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FILED

DISTRICT COURT OF GUAM

JUL 19 2005

MARY L.M. MORAN

CLERK OF COURT

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**IN THE DISTRICT COURT OF GUAM
HAGÁTÑA, GUAM**

JULIE BABAUTA SANTOS, individually
and on behalf of all those similarly situated,

Petitioner,

vs.

FELIX P. CAMACHO, Governor of Guam;
ART ILAGAN, Director of Department of
Revenue and Taxation; LOURDES M.
PEREZ, Director of Department of
Administration; DOUGLAS B. MOYLAN,
Attorney General of Guam; and
GOVERNMENT OF GUAM,

Respondents.

Civil Case No. 04-00006

**ATTORNEY GENERAL'S
SUPPLEMENTAL REPLY TO MOTION
TO DISQUALIFY ATTORNEY
GENERAL'S OFFICE**

The Attorney General respectfully supplements his Reply to Motion to Disqualify Attorney General's Office filed February 28, 2005, as follows:

Armed with Orders authorizing him to select his own counsel for himself and the Director of Revenue and Taxation and Director of Administration, which effectively disqualifies the Attorney General from representing any named official defendant in this case, the Governor seeks

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1 to disqualify the Attorney General from representing the Government of Guam altogether. Having
2 succeeded in abandoning ship and obtaining his own lawyers, the Governor now seeks to climb
3 back aboard with a new crew and throw the captain overboard.

4 As argued previously, this is nothing more and nothing less than a tax refund case.
5 Plaintiffs claim they are entitled to a refund of EITC. The Governor, generally supportive of the
6 concept, argued he cannot fund it (although now he has tendered a settlement to the Court that will
7 cost the Government of Guam \$30 million more than the original settlement preliminarily
8 approved by the Court that was tendered by the Attorney General). But, as a matter of federal law,
9 the only real defendant party in interest in this tax refund case is not the Governor, Department of
10 Revenue and Taxation, or Department of Administration, but the "Government of Guam."

11
12 Suits for the recovery of any Guam Territorial income tax
13 alleged to have been erroneously or illegally assessed or collected,
14 or of any penalty claimed to have been collected without authority,
15 or of any sum alleged to have been excessive or in any manner
wrongfully collected, under the income-tax laws in force in Guam,
pursuant to subsection (a) of this section, may, regardless of the
amount of claim, be maintained against the *government of Guam*....

16 48 U.S.C. § 1421i(h)(2) (emphasis added). The Governor is neither a necessary nor an
17 indispensable party to this action, except for relief purposes once a judgment against the
18 Government of Guam has become final. *See* 48 U.S.C. § 1421i(h)(2) ("When any judgment against
19 the government of Guam under this paragraph has become final, the Governor shall order the
20 payment of such judgments out of any unencumbered funds in the treasury of Guam."). Once a
21 judgment is obtained against the Government of Guam, the Governor's duties are purely
22 ministerial.

23
24 The tax laws on Guam, of course, mirror the federal law. "The income tax laws in force in
25 the United States of America and those which may hereafter be enacted shall be held to be likewise

1 in force in Guam” 48 U.S.C. § 1421i(a). And the Organic Act expressly substitutes the term
2 “Guam” for “United States” in the Revenue Code.¹ Construing the Organic Act together with the
3 Internal Revenue Code, it is clear that not only is the “Government of Guam” the only proper
4 defendant in this action, but that the Governor and Directors of Revenue and Taxation and
5 Administration are due to be dismissed. Substituting the term “Guam” for “United States,” federal
6 law is clear that suits for tax refunds are to be maintained only against the Government of Guam,
7 and not any officer or employee thereof.

8
9 (1) General rule

10 *A suit or proceeding referred to in subsection (a) may be*
11 *maintained only against the United States and not against*
12 *any officer or employee of the United States (or former*
13 *officer or employee) or his personal representative. Such*
14 *suit or proceeding may be maintained against the United*
15 *States notwithstanding the provisions of section 2502 of title*
16 *28 of the United States Code (relating to aliens’ privilege to*
17 *sue) and notwithstanding the provisions of section 1502 of*
18 *such title 28 (relating to certain treaty cases).*

19 (2) Misjoinder and change of venue

20 If a suit or proceeding brought in a United States district
21 court against an officer or employee of the United States (or
22 former officer or employee) or his personal representative is
23 improperly brought solely by virtue of paragraph (1), *the*
24 *court shall order, upon such terms as are just, that the*
25 *pleadings be amended to substitute the United States as a*
party for such officer or employee as of the time such action
commenced, upon proper service of process on the United
States. Such suit or proceeding shall upon request by the

26 ¹ “In applying as the Guam Territorial Income Tax the income tax laws in force in Guam pursuant to subsection (a) of
27 this section, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes
28 of 1954 and 1939, shall be read so as to substitute “Guam” for “United States”, “Governor or his delegate” for
29 “Secretary or his delegate”, “Governor or his delegate” for “Commissioner of Internal Revenue” and “Collector of
30 Internal Revenue”, “District Court of Guam” for “district court” and with other changes in nomenclature and other
31 language, including the omission of inapplicable language, where necessary to effect the intent of this section.” 48
32 U.S.C. § 1421i(e).

1 United States be transferred to the district or division where
2 it should have been brought if such action initially had been
brought against the United States.

3 26 U.S.C. § 7422(f) (emphasis added).

4 The Attorney General acknowledges that the Magistrate Judge has concluded that because
5 the Governor is tasked with administering and enforcing the tax laws on Guam, *see* 48 U.S.C.
6 §§ 1421i(c) and (d), he may therefore be entitled to be heard through separate counsel. On March
7 2, 2005, the Magistrate Judge issued an Order denying the Attorney General's motion for
8 reconsideration of its February 9, 2005 Order authorizing the Governor to obtain separate counsel.

9 In part, this Court held:

10
11 The Attorney General contends that the Court should listen to him
12 instead of the Governor, since the Attorney General is responsible
13 for establishing a "coherent and uniform legal policy" for the
14 Government of Guam. On the other hand, the chief executive officer
15 of the Government of Guam granted with the additional exclusive
16 authority to administer and enforce the GTIT [Guam Territorial
17 Income Tax] laws, the Governor has responsibility for setting a
18 "coherent and uniform tax policy" for the island. The Governor's
19 authority would be rendered meaningless if the Attorney General
20 were permitted to prevent the Governor from being heard in this
21 action except through him. The Attorney General essentially seeks
to supplant his decision for that of the Governor, and this Court will
not allow such usurpation to occur. The Governor has a right to be
heard in this action involving the GTIT. *See Graddick v. Newman*,
453 U.S. 928, 102 S. Ct. 4 (1981) (holding that the Alabama
attorney general had no standing to seek a stay of a court order
releasing prisoners in light of state statutes which vested
responsibility for state prison system in the governor, and governor
opposed the attorney general's application for stay).

22 Order, March 2, 2005, p. 4 {NR. 168}.

23 It is respectfully submitted that the Court's analysis is flawed. First, the fact that the
24 Governor is charged with the "exclusive authority to administer and enforce" the GTIT does not
25 mean he unilaterally controls litigation that is only rightfully brought against the "Government of

1 Guam.” Else, he would be a proper party to this action, which under the Organic Act he is not.
2 Second, even if the Governor were a proper party to this action (for relief purposes to perform a
3 ministerial act), that fact does not *ipso facto* mean he is authorized to represent the Government of
4 Guam to the exclusion of the Attorney General who is the only official charged under the Organic
5 Act with representing the legal interests of the Government of Guam. Yet that is the practical effect
6 of this Court’s holdings to-date. An official who is not even a proper party to this litigation has
7 usurped the role of the Chief Legal Counsel for the Government of Guam. Third, the Court’s
8 reliance on *Graddick v. Newman* is in error.

9
10 Contrary to the Court’s parenthetical description of the holding in *Graddick v. Newman*, the
11 United States Supreme Court did not hold that because the Governor of Alabama was vested with
12 responsibility for the state prison system, the Attorney General of Alabama did not have standing
13 to appear and seek a stay on behalf of the State of Alabama. Rather, the Court, per Justice Powell,
14 denied the Attorney General’s application for a stay on the basis that as a matter of Alabama law it
15 was *unclear* whether the Attorney General had standing to control litigation against the State, given
16 the Governor and Attorney General’s conflicting positions. “His standing to represent Alabama’s
17 interests in this matter were not self-evident in the unusual context of this case.” 453 U.S. at 934,
18 102 S. Ct. at 8. Therefore, as a matter of federal law, the Attorney General had simply failed to
19 show irreparable injury sufficient to meet the “exacting standard” required when seeking a stay.
20 453 U.S. at 937, 102 S. Ct. at 10. The most that can be said of Justice Powell’s dicta in *Graddick* is
21 that because of the confusion in Alabama law, the Attorney General’s application fell “far distant”
22 from satisfying the requirements of a stay. *Id.*

23
24 Justice Rehnquist wrote separately in *Graddick* to emphasize that Justice Powell’s rationale
25 should not be construed to have been adopted by entire Court, and that in his view Alabama law

1 and precedent were clear enough as to the Attorney General's standing to seek a stay on behalf of
2 the State of Alabama, even if the Governor opposed it. 453 U.S. at 937-943, 102 S. Ct. at 10-13.
3 And, finally, if Alabama law were not clear enough before *Graddick* that the Attorney General
4 controlled litigation against the State of Alabama, *see State ex rel. Carmichael v. Jones*, 252 Ala.
5 479, 41 So.2d 280 (1949), cited by Justice Rehnquist in his separate opinion, it has since become
6 clear in Alabama that while the Governor may sometimes in proper cases be permitted his own
7 voice if he has identifiable interests separate from the State, it is the Attorney General who
8 represents the State of Alabama, even over the objection of the state official charged with
9 administering and enforcing a particular aspect of the law. *See Ex parte Weaver*, 570 So.2d 675
10 (Ala. 1990). The fact that the Governor "administers and enforces" the tax laws on Guam does not
11 end the inquiry who is authorized to make litigation decisions on behalf of the only proper
12 defendant in this action – the Government of Guam.
13

14 The Governor's legal analysis in support of his motion to disqualify the Attorney General
15 lacks full context of the rules he cites. The Governor's motion is premised on Guam Rules of
16 Professional Conduct, Rules 1.7 and 1.9, ostensibly made applicable to government lawyers in the
17 present case by virtue of Rule 1.11(d). The Governor argues that Rule 1.7 prohibits an attorney
18 from representing a party directly adverse to an existing client; and Rule 1.9 prohibits an attorney
19 from representing a party directly adverse to a *former* client in the same manner. He argues that
20 Rules 1.7 and Rule 1.9 both are "expressly" applicable to the current situation by virtue of Rule
21 1.11. But Rule 1.11(a) – (c) pertains to lawyers who leave government service or as counsel for the
22 government who enter private practice, which is not the case here, and the Governor does not
23 contend otherwise. So, those subsections are inapplicable.
24
25

1 Rule 1.11(d) applies to current government lawyers who formerly represented clients in the
2 private sector in the same matter. But that is not what we have here, either. Rule 1.11(d) provides:

3 Except as law may otherwise expressly permit, a lawyer
4 currently serving as a public officer or employee:

5 (1) is subject to Rules 1.7 and 1.9; and

6 (2) shall not:

7 (i) participate in a matter in which the lawyer participated
8 personally and substantially while in private practice or
9 nongovernmental employment, unless the appropriate government
10 agency gives its informed consent, confirmed in writing; or

11 (ii) negotiate for private employment with any person who is
12 involved as a party or as lawyer for a party in a matter in which the
13 lawyer is participating personally and substantially, except that a
14 lawyer serving as a law clerk to a judge, other adjudicative officer
15 or arbitrator may negotiate for private employment as permitted by
16 Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

17 Note that Rule 11(d)(1) and (2) are in the conjunctive. Rule 11(d)(2)(i) prohibits a
18 government lawyer from participating as a government lawyer in a matter in which he participated
19 previously in private practice or nongovernmental employment. That is not the situation here. On
20 its face, then, Rule 1.11(d)(2) is inapplicable, for no government lawyer in this case participated in
21 this matter while in the private sector, nor has any government lawyer left government service or
22 attempted to negotiate private employment while serving as counsel to the government.

23 What we have appears to be a conflict between two government entities – the Government
24 of Guam versus the Governor. But according to the Comments to Rule 1.11, “The question of
25 whether two government agencies should be regarded as the same or different clients for conflict of
interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].” Rule 1.11
Comment [5] available at http://www.abanet.org/cpr/mrpc/rule_1_11_comm.html. Now, Rule

1 1.13, referred to in Comments [5] Rule 1.11, pertains to Organizations as clients. And that is what
2 we really are concerned about here. For the Governor, Department of Revenue and Taxation and
3 Department of Administration, like fingers on a hand, are nothing more than constituent parts of
4 one organizational entity known as the "Government of Guam." It is an absurd fiction to argue
5 otherwise. What we have here is not a conflict between different clients, but within the same
6 organization, the Government of Guam. Comment [9], Rule 1.13 reads as follows:

7
8 Government Agency

9 The duty defined in this Rule applies to governmental
10 organizations. *Defining precisely the identity of the client and*
11 *prescribing the resulting obligations of such lawyers may be more*
12 *difficult in the government context and is a matter beyond the scope*
13 *of these Rules. See Scope [18]. Although in some circumstances the*
14 *client may be a specific agency, it may also be a branch of*
15 *government, such as the executive branch, or the government as a*
16 *whole. For example, if the action or failure to act involves the head*
17 *of a bureau, either the department of which the bureau is a part or*
18 *the relevant branch of government may be the client for purposes of*
19 *this Rule. Moreover, in a matter involving the conduct of*
20 *government officials, a government lawyer may have authority*
21 *under applicable law to question such conduct more extensively*
22 *than that of a lawyer for a private organization in similar*
23 *circumstances. Thus, when the client is a governmental*
24 *organization, a different balance may be appropriate between*
25 *maintaining confidentiality and assuring that the wrongful act is*
prevented or rectified, for public business is involved. In addition,
duties of lawyers employed by the government or lawyers in
military service may be defined by statutes and regulation. This Rule
does not limit that authority. See Scope.

20 Comment [9], Rule 1.13, ABA Model Rules, available at [http://www.abanet.org/cpr/mrpc/](http://www.abanet.org/cpr/mrpc/rule_1_13_comm.html)
21 [rule_1_13_comm.html](http://www.abanet.org/cpr/mrpc/rule_1_13_comm.html) (emphasis added). Now, consider what the "Scope" of the Guam Rules of
22 Professional Conduct has to say:

24 Under various legal provisions, including constitutional,
25 statutory and common law, the responsibilities of government
lawyers may include authority concerning legal matters that

1 ordinarily reposes in the client in private client-lawyer relationships.
2 For example, a lawyer for a government agency may have authority
3 on behalf of the government to decide upon settlement or whether to
4 appeal from an adverse judgment. Such authority in various respects
5 is generally vested in the attorney general and the state's attorney in
6 state government, and their federal counterparts, and the same may
7 be true of other government law officers. *Also, lawyers under the
8 supervision of these officers may be authorized to represent several
9 government agencies in intragovernmental legal controversies in
10 circumstances where a private lawyer could not represent multiple
11 private clients. These Rules do not abrogate any such authority.*

12 Guam Rules of Professional Conduct, [18] (emphasis added).

13 The rules themselves are dispositive of the Governor's argument. Indeed, the very rules the
14 Governor cites should have been dispositive of his argument that he, the Department of Revenue
15 and Taxation, and the Department of Administration may obtain their own attorneys in this action
16 against the "Government of Guam." The Attorney General has not become suddenly adverse to his
17 own client. His client has always been the Government of Guam, and its position has never
18 changed. The Governor, who has no business being in this lawsuit to begin with, simply wanted to
19 make his own deal, and has wrested control of the case from the only person authorized by the
20 Organic Act to represent the only proper defendant in this case, Government of Guam. Contrary to
21 this Court's March 2, 2005 Order, it is not the Attorney General who seeks to usurp the role of the
22 Governor; it is the other way around.

23 Consider the mischief the Governor's motion to disqualify now proposes. Individual
24 government officers come and go all the time in government service, or change their mind. New
25 administrations come and go with different philosophies than their predecessors. If each successor
administration, or every administration that changed its mind in the middle of litigation, is
permitted to renege on the deals it or its predecessor made, and at the same time disqualify the
"Chief Legal Counsel for the Government of Guam," *see* 48 U.S.C. § 1421g(d)(1), there can

1 never be a coherent legal policy for the Government of Guam. Any settlement agreement
2 entered into before the courts on behalf of the Government of Guam would become meaningless
3 and unenforceable merely because an executive officer charged with enforcing and
4 administering a particular aspect of law on Guam disagrees with the Attorney General. The
5 rules governing disqualification of counsel as applied to the government do not support that
6 reasoning; and it is not the intent of the Organic Act. But that is the mischief of the Governor's
7 reasoning. The law is clear that intra-governmental disputes such as those in the case at bar do
8 not rise to the level of disqualifying conflicts of interest for government lawyers, and the
9 Attorney General is not disqualified from representing the Government of Guam merely
10 because the Governor, who has no business being in this lawsuit to begin with, has changed his
11 mind.
12


13 CONCLUSION

14 The Attorney General respectfully submits that the Motion to Disqualify the Attorney
15 General's Office is without merit and due to be denied.

16 Respectfully submitted,

17 this 19th day of July, 2005.

18 OFFICE OF THE ATTORNEY GENERAL
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21 Robert M. Weinberg
22 Assistant Attorney General
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this 19th day of July, 2005.


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